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No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1981

JOSEPH M. COUCH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the rule of *Dunaway v. New York*, 442 U.S. 200 (1979), which establishes a clear distinction between the level of suspicion required for a brief detention and that level required for a more lengthy seizure of an individual, shall be applied in the context of a ten-hour border detention for purposes of interrogating the person detained and securing a warrant for an x-ray search of that person.

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The petitioner, Joseph Mark Couch, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 6, 1982.

OPINIONS BELOW

The memorandum opinion of the Court of Appeals [which is unreported] appears in the Appendix hereto. The District Court for the Central District of California did not issue a written opinion.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 6, 1982. No petition for rehearing was filed. This petition for certiorari is filed within sixty days of May 6, 1982. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 4, 1980, Agent Cook of the Drug Enforcement Administration told Customs Agent Souza that a reliable informant had relayed the following information: Five individuals, including Petitioner, planned to smuggle cocaine from Lima, Peru into the United States some time during the week of March 3, 1980. (TR[1] 23-24, 36, 60-65)[2] The informant described an elaborate scheme, alleging that the individuals would swallow capsules containing cocaine, then ingest a drug to inhibit their normal digestive processes, and take a laxative once they arrived at their destinations in order to expel the cocaine. The informant also stated that Petitioner had avoided an x-ray examination in Peru in December, 1979 because he had been overexposed to radiation in the past.

Agent Souza contacted Drug Enforcement Agency agents to assure the agency had lookouts placed at the airport. (TR 25) On March 5, Petitioner and one traveling companion arrived on a 7:30 a.m. flight from Peru. A routine search of their baggage and a further search of their per-

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[1]"TR" refers to the Reporter's Transcript of the suppression hearing held May 5 and May 12, 1980.

[2]A more detailed statement of facts is contained in the memorandum opinion of the Appellate Court in Appendix A, P. A2-6.

sons revealed nothing suspicious. Petitioner was separated from his companion and transported to a Drug Enforcement Agency office.

At this time, the only verified information agents had was Petitioner's name. The District Court found the informant "merely indicated that there would be some people arriving and nothing more than that." (TR 116) Officials asked Petitioner to submit to an x-ray examination, but he refused, stating he had been overexposed to radiation in the past. (TR 39) Agents questioned Petitioner and informed him they suspected he was smuggling.

Around 10:00 a.m. on March 5, officials informed Agent Souza that Petitioner had been detained. He did not go to the airport, but immediately proceeded to the U.S. Courthouse where, he, along with other Drug Enforcement Agency agents and U.S. Attorney Dwyer, prepared an affidavit to obtain a warrant requiring Petitioner to submit to x-rays. At 2:30 p.m., Agent Souza phoned the officials who were holding Petitioner and learned he had refused food and beverage. This fact, and the fact that Petitioner had declined to be x-rayed claiming overexposure, were included in the affidavit. The affidavit was presented to the Magistrate around 4:30 p.m., and to Petitioner around 7:00 p.m., on March 5. (TR 30, 90-91)

Numerous x-rays revealed a number of opaque objects in his digestive tract. Petitioner was formally arrested the night of March 5. Over the next few days he excreted capsules which contained cocaine.

2. Petitioner moved to suppress the cocaine obtained as a result of the detention and subsequent x-rays. After

a hearing the District Court granted the motion, holding that the detention was unreasonable and that the informant's information was uncorroborated. (TR 116)

3. On the government's Appeal, a panel of the Court of Appeals reversed. The Court held that the ten-hour detention of Petitioner was reasonable and that the standard of *Dunaway v. New York* 442 U.S. 200 (1979) does not apply to border searches and seizures. The Court also held that the affidavit was sufficient to support the warrant.

REASONS FOR GRANTING THE PETITION

This case presents an issue of first impression for this Court. Recently, this Court established that probable cause is needed whenever a person is detained or seized for more than a brief period of time. (See *Dunaway v. New York*, 442 U.S. 200 (1979).) This Court has yet to determine if this standard should apply to prolonged border detentions for purposes of questioning and further searching of an individual. Accordingly, review by this Court is warranted.

While it is settled that border agents do have broader power than other police agents in conducting searches (*U.S. v. Ramsey*, 431 U.S. 606 (1977)), this Court has not permitted border agents to arrest an individual without probable cause. In reviewing border searches, this Court has applied a standard of reasonableness rather than probable cause.

As the level of intrusion on an individual rises, the border agent must have significantly more information to justify his conduct. (See *U.S. v. Ramsey, supra* 431 U.S. at 619; *U.S. v. Rodriguez*, 592 F.2d 553, 556 (9th Cir. 1979);

U.S. v. Aman, 624 F.2d 911, 912-913 (9th Cir. 1980).) Traditionally, then, courts have recognized that the Fourth Amendment limits border searches relative to the type of intrusion involved. The prolonged seizure of a person is a most significant intrusion into personal liberty.

> "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference by others, unless by clear and unquestionable authority of law. [Citations]" *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

A full-scale seizure of the person has not been held valid without probable cause.

In *Dunaway v. New York, supra*, this Court distinguished the *Terry* standard necessary for brief stops, a standard requiring less than probable cause, from that necessary for a more lengthy custodial detention.

> "Indeed, any 'exception' that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule of the Fourth Amendment. Seizures are 'reasonable,' only if based on probable cause . . .
>
> "[D]etention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest." (*Id.*, at p. 213-216)

The *Dunaway* rule was applied in a border context in *U.S. v. Perez-Esparza*, 609 F.2d 1284 (9th Cir. 1979). In that case, a three-hour detention at a border checkpoint was held to violate the *Dunaway* standard.

> "We thus conclude that while Perez-Esparza was legally stopped for questioning, the Border Patrol

> lacked probable cause to arrest him and, therefore, could not detain him as was done in this case for custodial interrogation." (*Id.*, at p. 1288)

In the present case, the Appellate Court distinguished *Perez-Esparza* on the grounds that the border checkpoint was not the functional equivalent of a border and held that *Dunaway* does not apply to borders.

The Appellate Court relied on *U.S. v. Erwin* 625 F.2d 838 (9th Cir. 1980) in its decision. Officials in *Erwin* saw defendant's restricted movements and found items in her luggage which supported their belief that she had contraband in a body cavity. In upholding the detention, the *Erwin* court relied on the border distinction to justify the officials' actions. The *Erwin* court held that the detention did not exceed "what was necessary for the agents to conduct a legal border search."[3] (*Id.*, at p. 841) The *Erwin* standard implies that agents may undertake any seizure of the person so long as it is necessary to complete a border search. *Erwin* and the Appellate Court decision here grant limitless power to border agents, a concept never sanctioned by this Court. The issue presented by this petition is one where this Court must determine the appropriate limits on seizures of individuals at a border.

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[3]Arguably, in *Erwin*, agents had enough information, as more information was uncovered at each investigative step, to justify the body cavity search. In the present case, at the time of the detention, agents knew no more than Petitioner's name, and the District Court held that the detention was unreasonable as based solely on that information.

In *U.S. v. Nieves* 609 F.2d 642 (2nd Cir. 1979), cert. denied, 444 U.S. 1085 (1980), the defendant contended that a post-customs detention constituted a *Dunaway* arrest. The Court applied the investigative detention standard articulated in *Terry v. Ohio* 392 U.S. 1 (1968), which permits a limited investigative stop on circumstances less than probable cause, and held that the stop of the defendant in *Nieves* and her voluntary decision to accompany the official to the customs inspection area was a lawful *Terry* stop, not a *Dunaway* arrest.

Nieves did not reach the *Dunaway* issue because the defendant consented to the detention. However, if the *Terry* standard applies in a border context, *Dunaway* must also control border seizures as it defines the limits of a *Terry* stop.

In contrast, the present case squarely presents the issue of a *Dunaway* arrest at a border. There is no question that Petitioner did not consent. He was stopped, his luggage was searched and when neither of these steps revealed anything suspicious, he was then taken from the inspection area to a Drug Enforcement Agency office and held for the day. He was questioned and told that officials suspected he was smuggling. At 5:00 p.m., after officials had told Agent Souza that Petitioner had refused food and beverage and that he would not submit to x-rays because he was afraid of overexposure, Petitioner was handcuffed and transported to a hospital where x-rays were taken.

A less egregious detention, though it did not occur at the border, was described in *U.S. v. Hill* 626 F.2d 429 (5th Cir. 1980) as a *Dunaway* arrest. Police received an

anonymous tip that a drug deal was "going down" at the Greensboro Airport and one participant was a black man wearing a green coat with white fur trim. Sheriff's deputies saw the man leave on a flight to Atlanta and the above information was relayed to DEA agents in Atlanta. Two days later DEA Agent Markonni saw the described man disembark from a Los Angeles-Atlanta flight. Markonni approached defendant and asked for his consent to a search, but defendant refused. The defendant began to accompany the agent to an office, then began running through the airport. He was eventually subdued and searched, and agents found PCP. Noting that *Dunaway* has been applied in various situations, the *Hill* court held:

> "[U]nder the reasoning employed in *Dunaway*, Markonni's request for Hill to accompany him to the Delta office constituted a significantly greater intrusion than a brief *Terry* stop and thus, must be classified as an arrest requiring probable cause. First, as in *Dunaway*, the intrusion in this case was not limited to brief, on-the-spot questioning . . . [T]he request [to accompany Markonni] signaled the beginning of a more extended interrogation which was to occur in a place other than where it began. Second, as in *Dunaway*, Hill was never informed that he was 'free to go,' and the circumstances surrounding the request indicate that Hill would have been physically restrained if he had refused . . . Third, as in *Dunaway*, the circumstances indicate that the detention involved here was for the purpose of interrogation. In sum, the scope of the intrusion . . . was significantly greater than that involved in a brief *Terry* stop, and therefore amounted to an arrest." (*Id.*, at p. 435-436)

Here, the trial court held that the ten-hour detention of Petitioner was

> "unreasonable under the circumstances, the lack of the proper corroboration of the confidential informant, who merely indicated that there would be some people arriving and nothing more than that . . . I do not think that is sufficient to . . . interrogate someone, to go ahead and detain him for up to ten hours . . ." (TR 116)

The lengthy detention, coupled with the movement of Petitioner to the DEA office and the questioning there went beyond acceptable limits on official conduct at a border. The instant case presents an excellent factual vehicle for this Court to determine these limits.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: June 28, 1982

Respectfully submitted,

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(Appendix follows)

Appendix

United States Court of Appeals
For the Ninth Circuit

No. 80-1524
DC No. 80-246-TJH

United States of America,
Plaintiff-Appellant,

v.

Joseph Mark Couch,
Defendant-Appellee.

[Filed May 6, 1982]

MEMORANDUM

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, Jr., District Judge, Presiding
Argued and submitted May 4, 1981

Before: BOOCHEVER and NORRIS, Circuit Judges, and VOORHEES,* District Judge.

This case requires us to evaluate the border detention of an individual suspected of carrying illicit drugs within his body. Joseph Mark Couch was indicted for importation and possession of cocaine. Prior to trial, he moved to suppress x-rays of his abdominal region, and the cocaine eventually retrieved from his digestive system. The dis-

*The Honorable Donald S. Voorhees, United States District Judge for the Western District of Washington, sitting by designation.

trict court granted his suppression motion, finding that Couch's airport detention of over nine hours was unreasonable, and that the affidavits supporting a court-ordered x-ray examination were insufficient to establish probable cause. The government appeals the suppression order, and we reverse.

FACTS

On March 4, 1980, the Drug Enforcement Administration (DEA) notified agent Donald Souza of the Los Angeles office of the Customs Service that several people would be attempting to smuggle cocaine into the United States from Lima, Peru by concealing the drug in their stomachs. The DEA received its information from a previously reliable confidential informant. One of the individuals mentioned in the scheme was the defendant and appellee, Joseph Couch.

The informant gave a specific description of the smuggling scheme. Couch and the other individuals would take a laxative to clean out their systems, swallow several capsules of cocaine, and then take a drug that inhibited the normal digestive process. Once the smugglers reached their destination, they were to take another laxative and retrieve the cocaine. The informant also stated that the trip reservations were made at a Menlo Park, California travel agency, that the tickets were paid for with cash, and that the individuals would return to the United States during the week of March 3, 1980. Finally, the informant stated that when Couch had been detained by Peruvian customs officials on an earlier trip in December, 1979, he

had avoided an x-ray examination by claiming that he had previously been overexposed to x-rays and feared further exposure. The informant did not state how the information was obtained.

Based on this information, Souza notified customs inspectors at Los Angeles International Airport to watch for the individuals, but did not begin to prepare an affidavit or take any other steps to secure a warrant. At 7:30 a.m. on March 5, 1980, Couch and his traveling companion Robert Ek arrived at the airport and were detained by DEA agents and customs officials. The officials notified Souza of the detention by radio, and he proceeded to the United States Attorney's office to prepare an affidavit to support a court-ordered x-ray search of Couch and Ek.

The customs agents individually informed Couch and Ek that they were suspected of smuggling narcotics and took them to a secondary search area. At this point the suspects were separated. The agents searched Couch's baggage and person but did not find narcotics or any indicia of smuggling. Couch refused to consent to a voluntary x-ray examination of his abdominal area, explaining that he had been previously overexposed to x-rays and felt that further exposure would be harmful to his health. Thereafter Couch was taken to the DEA office in another part of the airport, and was told he would be detained until the agents could obtain a court order for an x-ray examination.

Agents detained Couch in the DEA office from approximately 9:00 a.m. until 5:00 p.m., when he was handcuffed and taken to a nearby hospital for x-rays. During this

period, the DEA agents informed Couch of his *Miranda*[1] rights, but refused several requests for an attorney, informing Couch that he was not entitled to one.[2] Couch was kept under constant surveillance, was not permitted to make any phone calls, and knew he was not free to leave. Furthermore, two DEA agents questioned Couch, asking him several routine questions as well as what he was doing in Peru and whether he was carrying drugs. During questioning, Couch explained that his fear of x-rays stemmed from overexposure during his previous employment at General Electric and at a hospital. Later in the afternoon, an investigation indicated that neither employer had any record of Couch's employment, but Couch basically stuck to his story. The agents offered Couch food and water, which he refused.

During Couch's detention, Souza and a United States Attorney worked from 10:00 a.m. until 3:00 p.m. preparing a three and one-half page affidavit, reciting all of the information provided by the confidential informant. The following additional information, obtained since Couch's arrival, was also included: Couch and Ek had arrived at 7:30 a.m. on a flight from Peru; the initial search proved negative; Couch had refused to submit to an x-ray for alleged health reasons; and at 2:30 p.m. a call to the airport confirmed that Couch had refused any food and had not urinated

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[2] In Couch's declaration in support of the motion to suppress, he states: "I again asked for an attorney, but agents refused, stating that I was not entitled to one because I was not under arrest." The agents apparently thought that Couch was requesting appointment of counsel, but Couch asserts that he merely wanted to contact an attorney.

or defecated since arrival. At 4:30 p.m., a magistrate issued a court order authorizing x-rays of Couch and Ek, conducted "in a reasonable manner" by a doctor at a local hospital.

After Couch was taken from the airport to the hospital, he was shown the court order and told that he would be forced to comply if he did not voluntarily submit to the procedure. Couch again explained his fears about x-ray exposure and requested an attorney, but signed a consent form for the x-rays. Several x-rays were taken, which revealed foreign objects in Couch's stomach. Couch was then formally arrested, and transferred to another hospital for observation. Over the next several days Couch excreted a total of thirty-six capsules, containing 181.2 grams of cocaine.

Couch and Ek were indicted for importing cocaine in violation of 21 U.S.C. §§ 952(a) and 960(a)(1), and possessing cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). Separate trials were scheduled for the defendants.[3] Prior to trial, Couch filed a motion to suppress all evidence obtained from the detention, and all evidence from the court order, including the x-rays and the cocaine. Couch argued that the detention was illegal because it was, in effect, an arrest without probable cause, that the affidavit supporting the court order was insuffi-

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[3]Ek was tried before District Judge Kelleher, who denied Ek's pretrial suppression motion. Although Couch and Ek were held in separate detention rooms at the airport, it appears that the circumstances of their detentions were similar. Ek's conviction was affirmed by another panel of this court. *United States v. Ek*, No. 80-1452 (9th Cir., April 30, 1982).

cient, and that the use of an x-ray examination was unreasonable. After an evidentiary hearing, District Judge Hatter granted Couch's motion in a minute order. The court did not enter written findings of fact, but the transcript of the suppression hearing indicates that the court based its order on the unreasonable length and nature of the detention, and the insufficiency of the affidavit. The government appeals the suppression order to this court pursuant to 18 U.S.C. § 3731.

I

Reasonableness of the Detention

When entering this country, persons are subject to routine searches without probable cause. *United States v. Ramsey*, 431 U.S. 606, 619 (1977); *United States v. Perez*, 644 F.2d 1299, 1302 (9th Cir. 1981). Furthermore, the first United States location at which an international flight lands is considered the "functional equivalent" of the border, and the same standards apply as at the actual border. *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973). Couch's flight was non-stop from Lima, Peru to Los Angeles International Airport; thus, the initial detention and search, conducted in a reasonable manner, do not present any constitutional issues.

Couch argues that his extended detention, between the time of the initial search and execution of the court-ordered x-ray examination over nine hours later, was in effect an arrest requiring probable cause, citing *Dunaway v. New York*, 442 U.S. 200 (1979). In *Dunaway*, a suspect was taken to a police station and questioned about a crime. He made incriminating statements. The Court held that the deten-

tion for the purpose of custodial interrogation was illegal where the police did not have probable cause to arrest. 442 U.S. at 212-13. *Dunaway* makes it clear that courts must distinguish between brief investigatory stops based on reasonable suspicion, and arrests requiring probable cause. *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968).

Although *Dunaway* is a useful starting point, it does not directly control the instant case. First, *Dunaway* stressed that the objectional feature of the suspect's detention was custodial interrogation; the Court suppressed the suspect's incriminating statements. 442 U.S. at 216. In the instant case, although Couch was asked some questions, the purpose of the detention was to secure a warrant, not to elicit information. Second, the detention in this case occurred at the border. Government agents are given considerably more leeway at the border. *United States v. Erwin*, 625 F.2d 838, 841 (9th Cir. 1980). We must therefore analyze the nature of Couch's detention in light of the border search standards developed in this circuit.

In *United States v. Cameron*, 538 F.2d 254 (9th Cir. 1976), this court held a suspect's slurred speech, needlemarks and lubricant in the rectal area provided the necessary "clear indication" for a body cavity search, but nevertheless found that the particular search was conducted in an objectionable manner. *Id.* at 257-58. In dictum, the court stated that the Ninth Circuit rule is that warrants are not required for a body cavity search, but expressed a strong preference for a warrant. 538 F.2d at 258-59. *See* 3 W. LaFave, *Search & Seizure* § 10.5, at 292-93 (1978). The court noted that it would be permissible to detain a suspect while a warrant was obtained. 538 F.2d at 257 n.7.

On the other hand, this court recently held that a two and one-half hour detention at a Border Patrol check point was unreasonable, and reversed the resulting narcotics conviction. *United States v. Perez-Esparza*, 609 F.2d 1284 (9th Cir. 1979). The court relied heavily on *Dunaway*, finding that the suspect was delayed for the purpose of custodial interrogation, not for the purpose of obtaining a warrant. *Id.* at 1287. The *Perez-Esparza* court also suggested that its holding was based in part on the fact that the agents did not have a valid justification to detain the suspects. *Id.* at 1287 n.2.[4] In any event, *Perez-Esparza* is not on point because a search at a Border Patrol check point is not the functional equivalent of a border search. *United States v. Morgan*, 501 F.2d 1351 (9th Cir. 1974) (en banc) (per curiam).

The case closest to the instant case is *United States v. Erwin*, 625 F.2d 838 (9th Cir. 1980), which was decided after Couch's suppression hearing. In *Erwin*, airport customs agents became suspicious of a passenger whose restricted movements and luggage contents indicated body cavity smuggling. After the suspect refused to submit to a strip search, she was detained seven hours while a court order for a strip search and x-ray examination was obtained. Erwin challenged her heroin conviction on the ground that the seven-hour detention was an illegal arrest within the meaning of *Dunaway* and *Perez-Esparza*. The *Erwin* court rejected this argument, holding that the de-

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[4]By contrast, the agents' justification for detaining Couch in this case was to preserve the status quo while they obtained a court order, a practice approved in dictum by the *Cameron* court. 538 F. 2d at 258 n.7.

tention while a warrant was obtained was reasonable. *Id.* at 841. The court suggested that it would be inconsistent to express a preference for warrants, as in *Cameron*, but to hold that detention pending a warrant was unreasonable.[5]

There is an arguable distinction between *Erwin* and the circumstances of Couch's detention. Erwin was detained only after a search of her luggage revealed items commonly used in body cavity smuggling, and her restricted body movements bolstered the customs agents' suspicions. Suspicion focused on Couch before his plane landed. The initial search did not reveal anything incriminating. Because an informant's tip rather than the fruits of an airport search was the basis for detention, Couch argues that the agents should have either applied for a warrant before his arrival, or prepared affidavits ahead of time and applied for a telephone warrant after the tip was verified upon his arrival. Fed.R.Crim.P. 41(c)(2). Couch contends that the purpose of his extended detention was to obtain evidence before the warrant was procured, either through questioning or eventual excretion of the capsules.

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[5]We need not reach the issue of whether the defendant could have complained had the agents detained him until his own bodily processes had cleared his digestive tract of its contents. That process might have taken as long as two or three days. The means chosen by the agents of seeking a court order authorizing the taking of x-rays caused defendant to be detained a considerably shorter period of time than he would have been detained had the agents chosen the alternative, but arguably permissible, method of determining what was in fact within his digestive tract.

Although detention pending a warrant may be more reasonable when suspicion arises after arrival, as in *Erwin*, we are not prepared to make the constitutional distinction urged by Couch.[6] The reason that the initial search of Couch did not indicate smuggling was that the ingestion method does not leave external signs of smuggling. By contrast, the method of smuggling used in *Erwin* often results in restrictive body movements, items such as condoms and lubricants in the luggage, and traces of lubricant on the outside of the body. *See United States v. Purvis*, 632 F.2d 94, 95 (9th Cir. 1980); *Erwin*, 625 F.2d at 840; *United States v. Aman*, 624 F.2d 911, 912 (9th Cir. 1980). We decline to afford the smuggling method used by Couch more protection merely because it is more concealable than Erwin's method. We find that *Erwin* controls and the detention here was reasonable.

Moreover, we are not convinced that it would have been preferable for the agents in this case to apply for the warrant ahead of time, or arrange for a telephonic warrant.[7] Prior to Couch's arrival at the airport, agent Souza

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[6]Couch also argues that *Erwin* is distinguishable because the total time of Erwin's detention was less than his own. Although it was close to twelve hours from the time Couch's airplane landed until his formal arrest, we measure the detention from 9:00 a.m., when the secondary search was completed, until 4:30 p.m. when the agents obtained the court order. We do not find any constitutional significance to the difference between this time period and the seven hours Erwin was detained.

[7]In examining the testimony of agents Souza and Cathey, we do not find any indication of intentional delay. Souza went directly to the United States Attorney's office and worked on the affidavit with Cathey and assistant United States attorney Dwyer from 10:00 a.m. until 2:30 p.m. The agents encountered administrative difficulties, but obtained the magistrate's approval by 4:30 p.m.

only had information that Couch would be arriving from Peru sometime during the week, with cocaine concealed in his stomach. Souza could not be sure that Couch would not alter his plans or whether the uncorroborated information from the confidential informant would be sufficient to obtain a court order. After Couch's arrival, several important details of the informant's tip were corroborated, notably that Couch and Ek had arrived from Peru and refused x-ray searches for health reasons. In addition, the agents may have considered that the parties might consent to an x-ray search, thus obviating the time and effort required to obtain a court order.

As a final factor in evaluating the reasonableness of the detention, we consider the customs agents' denial of Couch's specific requests for counsel.[8] We note initially that application for a court order is an *ex parte* proceeding in which neither the subject of the order nor the subject's attorney has a right to participate. *United States v. Erwin*, 625 F.2d 838, 840 (9th Cir. 1980). *Erwin* further held that the suspect's attorney had no right to be present during the search. *Id.* Although Couch was not yet charged with a crime and was not entitled to appointed counsel, under

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[8]Because Couch was not yet formally charged or indicted when his requests for counsel were denied, his sixth amendment right to counsel was not violated. *Brewer v. Williams*, 430 U.S. 387, 398 (1977). The record indicates that Couch was not free to leave, and officials asked him whether he was carrying drugs, thus implicating Couch's fifth amendment rights. *Miranda v. Arizona*, 384 U.S. 436 (1966). *See generally Rhode Island v. Innis*, 446 U.S. 291, 298-302 (1980). After requesting counsel, however, Couch did not make any incriminating statements that led to the discovery of the drugs. Thus the discovery of the narcotics was not the result of an illegal interrogation. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

other circumstances the failure to permit a telephone call and the denial of the right to consult with retained counsel could be decisive. Here, however, there was little if anything that counsel could have done to prevent the discovery of the incriminating evidence. We find that the denial of counsel under the circumstances did not render the detention, which was otherwise permissible under *Erwin*, unreasonable. We are not confronted with the question of admissibility of any statements obtained after Couch requested counsel. Any such issue remains to be resolved if and when Couch is tried.

We therefore conclude that the district court, which did not have the benefit of the *Erwin* decision, clearly erred in finding that Couch's detention was unreasonable. In view of this conclusion, it is unnecessary for us to decide whether a less deferential standard of review is applicable.

II

Sufficiency of the Affidavit

A border search may entail several levels of intrusion. The pat-down search of Couch and the search of his luggage were permissible with only a minimal showing of suspicion. *United States v. Ramsey*, 431 U.S. 606, 619 (1977). *See United States v. Perez*, 644 F.2d 1299, 1302 (9th Cir. 1981). A "strip search" is only permissible upon a showing of "real suspicion." *United States v. Rodriguez*, 592 F.2d 553, 556 (9th Cir. 1979). A body cavity search is an even greater intrusion, requiring a "clear indication" that the suspect is carrying contraband in a body cavity. *United States v. Aman*, 624 F.2d 911, 912-913 (9th Cir. 1980). When the government agents have such a clear

indication, a warrant is preferred but not required.* *Id* Like the court in *Aman*, we do not find it necesary to determine which test applies to x-ray searches, because we find that the agents in this case had a "clear indication" that Couch was engaged in drug smuggling. As discussed below, the affidavit in this case meets the requirements of the probable cause standard for issuance of a search warrant and this is certainly enough to satisfy the "clear indication" test.

The adequacy of an informant's hearsay tip, which was the basis for the warrant in this case, is judged under the test of *Aguilar v. Texas*, 378 U.S. 108, 114 (1964). We recently described the test as follows:

> First, the affida it must inform the magistrate of some of the underlying circumstances that indicate that the informant's information is reliable. Second, it must inform the magistrate of some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, was credible.

Untied States v. Whitney, 633 F.2d 902, 905-906 (9th Cir. 1980). The two prongs of the *Aguilar* test are referred to as the "basis" and "veracity" prongs. 1 W. LaFave, *Search and Seizure* § 3.3, at 501-502 (1978). There is no question of veracity here; the confidential informant had supplied reliable tips on at least five previous occasions. *McCray v. Illinois*, 386 U.S. 300, 304 (1967). The issue

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*Although a warrant or court order is not required, the agents in this case followed the procedure endorsed in *United States v. Aman*, 624 F.2d 911, 912-13 (9th Cir. 1980) and *United States v. Cameron*, 538 F.2d 254, 258-59 (9th Cir. 1976), and obtained a court order.

is whether the affidavit adequately disclosed the underlying circumstances indicating the informant's basis of knowledge.

The district court was apparently concerned that the affidavit provided no indication of how the informant obtained the information. In granting Couch's suppression motion, the court stated that the tip "merely indicated that there would be some people arriving and nothing more than that." The court placed little weight on the degree of detail in the affidavit, or on the corroborating circumstances occurring after the tip.

A tip that fails to disclose the basis of an informant's information can nevertheless be "verified" by its great detail. *Spinelli v. United States,* 393 U.S. 410, 416 (1969). The *Spinelli* Court suggested that the detail in *Draper v. United States,* 358 U.S. 307 (1959), was a "suitable benchmark." *Id.* In *Draper* the informant described the traveling plans and manner of dress of the suspect with great particularity, and thus the tip was adequate. Id. at 416-17. Similarly, we have held that an affidavit is sufficient even in the absence of underlying circumstances indicating reliability, where the criminal activity is described in sufficient detail. *United States v. Fried,* 576 F.2d 787, 790 (9th Cir.), *cert. denied,* 439 U.S. 895 (1978). *See United States v. Maher,* 645 F.2d 780, 781 (9th Cir. 1981); *United States v. Beusch,* 596 F.2d 871, 874-75 (9th Cir. 1979).

The detail in the instant case dealt with both the innocent circumstances of Couch's trip, and the alleged criminal activity. The informant told customs authorities that Couch and another white male named Robert [Ek], and

possibly others, would arrive at Los Angeles International Airport from Lima, Peru during the week of March 3, 1980. The informant disclosed exactly when and where the airline tickets were purchased, and provided a detailed description of the smuggling scheme: the smugglers would take laxatives to clean out their systems, swallow at least 30 capsules each containing one-half ounce of cocaine, take a drug to inhibit the normal functioning of their digestive systems, and take more laxatives once they were through customs and had reached their United States destination. The informant also told the agents that Couch had avoided an x-ray examination on a previous trip in 1979 by telling Peruvian officials that he had been overexposed to x-rays and feared further exposure.

In *United States v. Larkin*, 510 F.2d 13, 15 (9th Cir. 1974), we held that the *Aguilar* test was not met where the informant gave a detailed description of a car traveling on a certain highway at a certain time, and alleged that the car's occupants were carrying narcotics. But more recently we made it clear that sufficient detail will cure an otherwise inadequate disclosure of the basis of the informant's knowledge,[10] by examining the affidavit in a "commonsense and realistic fashion." *United States v. Maher*, 645 F.2d 780, 782 (9th Cir. 1981), *citing United States v. Ventresca*, 380 U.S. 102, 109 (1965). Here, the information provided by the informant more closely approx-

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[10]The self-verification approach has been criticized because detail might more appropriately be considered a component of veracity, not basis, but its use is well established. 1 W. LaFave, *Search & Seizure* § 3.3, at 544-46 (1978).

imated the detail in *Maher* than in *Larkin*, especially considering the degree of detail in the criminal allegations themselves.

Finally, the details provided by the informants were corroborated by the observations of customs agents, which were included in the affidavit. *Cf. Spinelli v. United States*, 393 U.S. 410, 417-18 (1969). The magistrate was informed that two individuals fitting the description provided by the informant's tip had in fact arrived at Los Angeles International Airport en route from Peru during the week indicated. The affidavit also stated that as of 2:30 p.m., Couch had refused to eat, defecate, or urinate during his detention. Finally, the affidavit stated that Couch refused to submit voluntarily to an x-ray examination, claiming that he had previously been overexposed and feared further x-rays for health reasons.

We find that the detail in the informant's tip was sufficient to establish probable cause.[11] This conclusion is bolstered by the degree of corroboration evident to the magistrate. Nothing occurring after Couch's arrival suggested that the informant was wrong. The corroborating circumstances, although perhaps innocent in themselves, strengthened the informant's tip and heightened the agents' jus-

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[11]We are aware that in most body cavity search cases, the circumstances of the initial pat-down or strip search have provided the facts necessary for a more intrusive search. *See, e.g., United States v. Purvis*, 632 F.2d 94, 95 (9th Cir. 1980) (slow and careful walk, suspect uncomfortable while sitting); *United States v. Aman*, 624 F.2d 911, 912 (9th Cir. 1980) (restricted movements, prophylactics and lubricants in luggage); *United States v. Cameron*, 538 F.2d 254, 257 (9th Cir. 1976) (needlemarks, slurred speech, lubricant in rectal area).

tifiable suspicion of Couch. Couch's further refusal to submit to x-rays, and the reasons he advanced, were suspicious in light of the other information before the magistrate.[12] *United States v. Maher*, 645 F.2d 780, 782 (9th Cir. 1981); *United States v. Larkin*, 510 F.2d 13, 15 (9th Cir. 1974). The agents were aware that Couch had previously used the health ploy to avoid x-rays. While the use of such an excuse may itself be innocent, the likelihood of an individual giving that specific reason is so remote as to render Couch's explanation strong corroboration.

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[12]Couch argues that his statement to Peruvian authorities should not be considered in evaluating the sufficiency of the affidavit, because customs agent Souza failed to check Couch's passport, which apparently did not have a Peruvian stamp for the time period in question. Couch's argument is that failure to check the passport created a reckless misstatement in the affidavit. *Franks v. Delaware*, 438 U.S. 154, 171 (1978). It is not clear what weight the district court gave to this argument in finding the affidavit insufficient. To the extent that the district court may have disregarded part of the affidavit of Souza's alleged misstatement, it was clearly in error.

First, upon receiving word that Couch had arrived, Souza went straight to the United States Attorney's office, not the airport. Even if he had asked another agent to check the passport, the lack of a Peruvian stamp would not have necessarily meant that Couch was not in Peru on a previous occasion. In addition, Couch admitted being in Peru during November of 1979. A one month error in the affidavit cannot be classified as a material misstatement. More importantly, an affiant does not have a duty to verify all of the assertions in an affidavit, especially when there has been no indication that the information is incorrect. Failure to verify Couch's previous presence in Peru was at most negligence, not reckless disregard for the truth, thus the *Franks* rationale does not apply. *United States v. Young Buffalo*, 591 F.2d 506, 510 (9th Cir.), *cert. denied*, 441 U.S. 950 (1979). *See United States v. Maher*, 645 F.2d 780, 782 (9th Cir. 1981).

The magistrate was justified in issuing a court order for the x-ray examination[15] of Couch.

CONCLUSION

Applying the clearly erroneous standard to the determination of reasonableness of the detention made by the district court in its suppression order, we do not reverse lightly. Nevertheless, we are convinced that the law of this circuit authorizes border detentions of suspected smugglers pending the procurement of a warrant or court order. In addition, we find that the affidavit supplied in this case was sufficient to support a court order under the probable cause standard, which would satisfy the warrantless standards of "real suspicion" or "clear indication" of drug smuggling. The previously reliable informant's tip specifically outlined the details of the smuggling scheme, and was corroborated by customs agents.

We believe that under the circumstances of this case the customs agents had enough evidence indicating that drugs were being smuggled that they could have insisted on an x-ray search, or in lieu thereof, detention until Couch's stomach contents were emptied, even without a court order.

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[15]Couch's argument, that the x-ray procedures were unreasonable because twelve x-rays were taken and his medical objections were not heeded, is unpersuasive. The magistrate ordered an x-ray examination conducted in a reasonable manner, at a local hospital, by a person licensed to conduct the procedure. Couch signed a consent form once shown the court order, and had a chance to voice his medical objections. There is no indication that the procedure followed in this case was "unconscionable," as Couch contends. The use of x-ray examinations to conduct body cavity searches has been accepted by this court. *United States v. Aman*, 624 F.2d 911, 913 (9th Cir. 1980).

Securing the order, however, was the preferable approach and the detention required for that purpose was not unreasonable.

For the foregoing reasons, the district court suppression order is REVERSED and the case is REMANDED for further proceedings.

FILED
JUL
ALEXANDER L. STEVAS
CLERK

No. 82-17

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH M. COUCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his extended detention at the border after entering the United States was in effect an arrest requiring probable cause.

In an indictment returned in the United States District Court for the Central District of California, petitioner was charged with importing cocaine, in violation of 21 U.S.C. 952(a) and 960(a)(1), and possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Following an evidentiary hearing, the district court ruled that petitioner had been detained by Customs officers for an unreasonable period of time at the Los Angeles International Airport, after a non-stop flight from Lima, Peru, while a court order was sought. It also ruled that the court order, authorizing x-rays of petitioner by a doctor at a local hospital, was unreasonable and was supported by an insufficient affidavit. The district court thereupon suppressed all

evidence obtained from the detention, including the x-rays and cocaine excreted from petitioner's body. The court of appeals reversed (Pet. App. A1-A19).

Petitioner contends (Pet. 4-9) that probable cause is needed to justify a prolonged detention at the border of a traveler coming into the United States. Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to dismiss. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted, he will then be able to present his contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JULY 1982

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[1]Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

DOJ-1982-07